Supreme Court, U. S.
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In the Supreme Court

of the United States

OCTOBER TERM, 1977

No. 77 1134

UNITED STATES OF AMERICA,

Appellee,

v.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W.A. GROFF, Director of Revenue of and for the State of Montana, and his successors in office,

Appellants.

An Appeal from the United States District Court for the District of Montana Helena Division

JURISDICTIONAL STATEMENT

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UNITED STATES OF AMERICA,

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Appellants.

JURISDICTIONAL STATEMENT

On Appeal from the United States District Court for the District of Montana, Helena Division

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Opinion Below

The judgment and opinion of the three judge Federal District Court for the District of Montana is reported at 437 Fed. Supp. 354 and are set forth in the separate Appendix, commencing respectively, at pages 1 and 5.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec.1253, this being an appeal from a final

declaratory judgment and decree of permanent injunction granted in a civil suit in which the United States was Plaintiff and which was heard and determined by a Federal District Court of three judges and in which the Montana Contractor's Gross Receipts Tax (Chapter 35, Title 84, Revised Codes of Montana) was declared unconstitutional and enforcement of the act was enjoined. Taxes collected under the Act since mid-1971 were ordered repaid. The action was commenced below by the United States pursuant to Title 28, Sections 1345, 2201, 2281 and 2284.

The judgment below was dated October 17, 1977, and was filed and entered on October 18, 1977, in the United States District Court for the District of Montana, Helena Division in Civil Action No. 1989. No order was made respecting any rehearing. Timely Notice of Appeal, dated December 15, 1977, was filed in the foregoing District Court on December 15, 1977, and a copy of the same is found in the Appendix, p. 36.

The statutory provisions believed to confer on this court jurisdiction of the appeal are Title 28 U.S.C. Secs.1253, 2281 and 2284.

Cases believed to sustain jurisdiction under the foregoing statutes are:

Philbrook -vs- Glodgett (Vt. 1975), 95 S. Ct. 1893, 421 U.S. 707, 44 L.Ed. (2d) 525

Chapman -vs- Meier (N.D. 1975) 95 S. Ct. 751, 420 U.S. 1, 42 L.Ed (2d) 766

Paul -vs- U.S. (Cal. 1963), 83 S. Ct. 426, 371 U.S. 245, 9 L. Ed(2d) 292

U.S. -vs- Georgia Public Service Commission (Ga. 1963), 83 S. Ct. 397, 371 U.S. 285, 9 L. Ed (2d) 317

The validity of a Montana state statute is involved in that the judgment below held that Chapter 35, Title 84 officially published in Vol. 5, Part 2 of Revised Codes of Montana, as amended, is in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2 and is, therefore, unconstitutional and void as to the United States of America, its contractors, subcontractors and those with whom it deals. The text of Chapter 35 is lengthy and is set forth verbatim in the Appendix commencing at page 38.

Nature of the Montana Act Which was Declared Unconstitutional

The Montana Act levies an initial 1% tax upon the gross receipts of "public contractors" defined to include all persons who perform contracts for the State of Montana, its subdivisions (e.g., counties, municipalities, school districts, special improvement districts etc.) and the United States Government. No gross receipts tax is levied under the Act upon "private contractors"—those who perform construction contracts for private citizens. The Act contains provisions for refunds and credits: public contractors who produce proof of payment of Montana personal property taxes receive dollar-for-dollar refunds of such taxes from the gross receipts taxes paid; the balance of the gross receipt tax may be claimed as a credit against Montana's personal income and corporate license taxes. By virtue of such credits the effective rate of the 1% gross receipts tax is reduced to approximately one half of one percent. The tax is levied on the contractor, not any governmental unit. The Federal government has nothing to do with collecting, withholding or remitting the tax.

Constitutionality of Montana Act was Twice Construed by the Montana Supreme Court During a Period When Federal Court Action in this case was Stayed for that Purpose

On April 2, 1971, Peter Kiewit Sons' Co. filed a suit in Lewis and Clark County, Montana challenging the constitutionality of the Act here in question. This state case is reported as *Kiewit Sons' -vs- St. Bd. of Equalization*, 161 Mont. 140, 505 P. (2d) 102 (1973), and can be conveniently referred to here as "Kiewit #1". It appears in the Appendix commencing page 105.

Also during the federal stay period, next described, the Montana Supreme Court decided *Kiewit #2*, 166 Mont. 260, 531 P. (2d) 1327, (1975), holding that *Kiewit* #1 was *res adjudicata* as to the constitutional challenges to the Act and additionally finding that the Act is a valid revenue raising measure.

On April 12, 1971, the United States filed a federal court complaint identical to the state court *Kiewit* #1 litigation in the Federal District Court of Montana, Cause No. 1989, Helena Division. A three judge Court was impaneled. On May 10, 1971, Montana filed its answer; and on May 24, 1971, the parties stipulated (App. 49) and the court made an order continuing the federal case without date "pending the resolution in the state courts or appeals therefrom of the (Kiewit) case." (App. 50.)

The United States controlled the state court litigation of *Kiewit*. It directed the filing of the case; paid the costs of litigation; was the real party in interest; directed the appeals to the Montana Supreme Court and to the United States Supreme Court. Notice of Appeal to the Supreme Court of the United States was filed in *Kiewit* #1 pursuant to 28 U.S.C. 1257 (2)

but was abandoned by Kiewit in August, 1973 at the direction of the U.S. Solicitor General, Erwin N. Griswold. (See Agreed Fact 12, App. 86)

After the state court litigation was concluded and the U.S. Supreme Court appeal was dismissed, Montana moved for Summary Judgment (App. 63) in the federal litigation under the rules of *England -vs-Medical Examiners*, 375 U.S. 411 and *Drummond -vs- U.S.*, 324 U.S. 316 on grounds that the United States controlled the state court litigation and had elected to fully litigate the case in the state courts and could not now return to the federal court to relitigate its claims. Also, the doctrines of res adjudicata and collateral estoppel were specified in support of such Motion. On November 8, 1974, the District Court denied the motion (App. 65-75), and the constitutional issues were again presented to the Federal Court resulting in the declaration of unconstitutionality and the injunction recited above.

QUESTIONS PRESENTED

1. Whether a one-half of one percent state gross receipts tax on contractors performing construction contracts for the State (and subdivisions) and Federal Governments violated the Supremacy Clause and the rule of *Phillips Chemical Co. -vs- Dumas School District*, 361 U.S. 376 (1960) because the revenue from the tax is a benefit to the State but not to the Federal Government.

2. Would not such an interpretation of the *Phillips* rule render any state tax on contractors or suppliers for both state and federal governments void and "overrule", sub-silentio, prior landmark decisions?[1].

[1] *James -vs- Dravo Contracting*, 320 U.S. 134, 82 L.Ed. 155, 58 S. Ct. 208 (1937)

3. Where the inherent nature of the Act requires classification of private citizens into taxpayers and non-taxpayers, did not the lower court err in eschewing any consideration of equal protection standards in testing for discrimination—electing instead to test solely under the Supremacy Clause?

4. Was it not error for the lower court to equate the Federal Government to the status of a taxpayer and test the classification of taxpayer and non-taxpayer under Supremacy standards; and would not such a Supremacy test invariably render state taxes void even when they clearly meet Equal Protection standards?

5. In this taxation field involving questions of "inter-governmental tax immunity" (*Phillips Chemical* at 361 U.S. 385) heavily involving present and future tax programs of the several states, should not the United States Supreme Court clearly define the scope of the requirement (*James -vs- Dravo*, Question 2, supra) that the state tax be "non-discriminatory"? Is the test for possible discrimination made under the Supremacy Clause (*Phillips Chemical* rule) or under the Equal Protection Clause of the Fourteenth Amendment (*Allied Stores -vs- Bowers*, 358 U.S. 522 (1959) *or both*? (See question as posed in *Homestake-Sapin Partners -vs- U.S.*, 375 F. (2d) 507, 512 (1967))

6. After electing the risks as specified in *England -vs- Louisiana Medical Examiners*, 375 U.S. 411, of

Silas Mason Co. -vs- Tax Comm. of Washington, 320 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937)

Alabama -vs- King & Boozer, 314 U.S. 1, 86 L. Ed. 3, 62 S. Ct. 43 (1941)

U.S. -vs- Detroit, 355 U.S. 466, 2 L. Ed. (2d) 424, 78 S. Ct. 474 (1958)

participating in and controlling state litigation which was conducted during stipulated abstention of federal litigation, can the Federal Government, when defeated at all state levels, return to the federal forum and relitigate the issues decided in the state court?

7. Are not the real parties in interest barred by the doctrines of res adjudicata and collateral estoppel from relitigating in the Federal Court issues resolved in state court litigation conducted during Federal Court abstention?

STATEMENT OF THE CASE

a) *Kiewit Decisions*

During the period of the Federal abstention, the Montana Supreme Court handed down opinions in both *Kiewit* #1 and #2 and decided:

a) There was a valid distinction for tax purposes between public contractors and private contractors, and the Act was not unconstitutionally discriminatory when gauged by Fourteenth Amendment, Equal Protection standards.

b) The Act did not unconstitutionally discriminate against the Federal Government under the Supremacy Clause (Art. VI, clause 2, U.S. Constitution) because those contractors who dealt with the State were treated no better than contractors dealing with the Federal Government as required by the *Phillips Chemical* rule.

c) The economic impact of the tax on the Government was not direct nor substantial and since it also was not discriminatory under either Equal Protection rules or Supremacy

rules, it met all requirements of *James -vs- Dravo*, 302 U.S. 134.

Kiewit #2 added the ruling that the Act was a valid revenue producing measure.

In November, 1974, after both *Kiewit* decisions the Federal Court denied Montana's motions for Summary Judgment, (App. 65). Thereafter the case was delayed getting on to trial because the Government desired to conduct an elaborate survey of the impact on in-state contractors -vs- out-of-state contractors of the Act's personal property and income tax credits. The Government hoped to show some discrimination against out-of-state contractors as suggested by the lower court in denying the State's motion for Summary Judgment (App.73) and thereby broaden its challenges to the Act beyond what the State courts had decided and so avoid the impact of the *England* and collateral estoppel rules. However, the survey showed that in-state contractors pay an effective tax after credits and refunds of .44% and out-of-state contractors working in the state pay .46%. In its final judgment the lower Court found the difference "de minimis" and the Government's contention of discrimination against out-of-state contractors to be without merit. (App. 17).

Immediately prior to trial in the federal court the Government agreed, after some four years of litigation, that the case of *Miller v. Arkansas*, 352 U.S. 187 was applicable and the regulatory provisions of the Act *do not apply* to the United States. (App. 78). A pre-trial order was prepared by the parties and approved by the trial judge. (App. 80-104).

b) *Federal Trial*

The case went to trial commencing March 30, 1976 before one of the three-judge panel—Hon. Russell E.

Smith. The Government's contentions were: (App. 92)

1. That the Act discriminates against the United States in violation of the Supremacy Clause in that:
   a) The Federal Government bears the entire burden of the tax.
   b) The Act forces the U.S. to pay more for its construction than does the State of Montana.
   c) The Act forces the Federal Government to pay more for its construction than does a private party.
2. The "legal incidence" of the tax falls on the United States. (rejected below)
3. The Act discriminates against out-of-state contractors. (rejected below)

The State's contentions were: (App. 94)

1. The Act treats federal contractors exactly the same as it treats state contractors and thereby complies with the *Phillips Chemical* rule (361 U.S. 376) and does not violate the Supremacy Clause.
2. There is a valid distinction for tax purposes between public contractors as a class and the class of contractors who perform work for private individuals; and hence, there is no discrimination under the Equal Protection Clause of the 14th Amendment.
3. No tax is laid directly on the U.S.; and the economic impact of the one half of one percent tax on the Government is neither direct nor substantial and therefore complies with the rule of *James -vs- Dravo*. (302 U.S. 134)
4. As the real party in interest in control of the

state court litigation, the Federal Government is barred by the doctrines of *England -vs- Medical Examiners*, 375 U.S. 411 and *Drummond -vs- U.S.*, 324 U.S. 316 from returning to the Federal forum and relitigating the case.

5. The Government's contentions that the Act discriminates against the U.S. by violating the Supremacy Clause and/or the Equal Protection Clause were each specifically passed upon by the Montana Supreme Court thereby barring re-litigation of such issues under the doctrine of collateral estoppel.

c) *Lower Court's Majority Decision*
(App. 5-19)

The majority of the lower court held:

1. There was Supremacy Clause discrimination against the Government because the revenues generated from the Act must be subtracted from the cost of otherwise matching, hypothetical State and Federal projects. Since the revenues of the State Act went to the State and not to the Federal Government, the State is treating itself better than the Government thereby violating the Supremacy Clause. (App. 11-13) (The lower court recognized (App. 12 para. 5) but held insignificant the fact that even under its foregoing comparison of costs at the sovereign level (rather than comparison of taxes at the contractor's level), all State subdivisions (cities, counties etc.) were treated exactly the same as the Federal Government since the tax went to the State and not to municipalities, school districts, SID's etc.)
2. While saying that it need not reach the question

of discrimination under the Equal Protection Clause, between the classes of contractors taxed and not taxed, the majority nevertheless found under unspecified standards that there was no distinction between public and private contractors and hence there was unlawful discrimination against Government contractors because of the tax on them. (App. 15-17)
3. Neither the *England* nor collateral estoppel doctrines were applicable. (App. 12-13)
4. In-state and out-of-state contractors are treated substantially identically and hence no constitutional violation at that level. (App. 17-18)

d) *Dissent Of Chief Circuit Judge Kilkenny*
(App. 20-35)

Judge Kilkenny vigorously dissented and noted:

1. Because of the Government's control of the state court litigation, it was bound by the state court results and could not return to the Federal forum and re-litigate. (*England rule*) (App. 25-26)
2. Collateral estoppel applies and forecloses reconsideration of the key supremacy and equal protection issues. (App. 23-27)
3. If the majority's Supremacy Clause requirement to deduct the tax from the cost of State construction were valid it would outlaw or "overrule", sub-silentio, the line of cases represented by *Dravo*. (App. 28) The proper test for Supremacy discrimination is at the level of the contractors who work either for the U.S. or for a division of State Government; and since the Act "treats

those who deal with the (federal) Government as well as it treats those with whom it deals", there is no Supremacy Clause violation. (App. 30-31)

4. The Act doesn't violate Equal Protection standards. The classification between public and private contractors is valid. (App. 31-33)
5. The legal incidence of the tax is not on the Federal Government. (App. 34)

- - - - -

QUESTIONS PRESENTED ARE SUBSTANTIAL

a) *The Lower Court Majority Misinterpreted and Misapplied the Phillips Chemical case.* [*Questions 1,2*]

The implications of the lower court's decision on the several States in the field of inter-sovereign taxation are cataclysmic; and as of the time of composition of this Jurisdictional Statement, some two dozen States already have indicated a desire to participate in the appeal as amici curiae.

The law in this area where sovereigns compete for valid taxation sources must be clear. The Attorneys General of the several states must know what state taxes can lawfully be enacted and what would transgress the Supremacy Clause. Both sovereigns must exist and perform their respective duties to their citizens.

> "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of similar power to the government of the Union; that it is to be concurrently exercised by the two governments are truths which have never been denied."
>
> *M'Culloch -vs- Maryland*, 4 Wheat. 415, 432

> "The States are, and they must ever be, coexistent with the national government. Neither can destroy the other. Hence, the federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States or prevent their efficient exercise."
>
> Holmes Dissent in *Panhandle Oil Co. -vs- Mississippi*, 227 U.S. 218,72 L. ED. 857, 48 S. Ct. 451 (1928)

Montana has never claimed that it had any power to levy a tax on the United States or in anywise license federal functions in the State of Montana. And under the plain reading of the *Dravo* and *King & Boozer* and *Phillips Chemical* cases, any state (prior to the lower holding here) could levy a 2% or less tax on contractors or suppliers of the Federal Government and since such a tax was neither directly on the Government nor the economic impact on it substantial, it was not unconstitutional if it was non-discriminatory. "Non-discrimination" in tax parlance had historically meant constitutional classification under Equal Protection rules (post 16); however, in the *Phillips Chemical* case it was further clarified to also mean that the state tax must be levied identically on contractors or suppliers of the State Government. This the Montana Act clearly did!

But the lower court majority misreads and misapplies the *Phillips Chemical* holding. Assuming hypothetically-matching state and federal projects, the lower court majority finds cost discrimination against the Federal Government because the tax itself can, be deducted from the cost of the state

project. Since the tax is a state tax, it goes to the State and not the federal coffers thereby, per the majority, creating an unconstitutional imbalance equal to the net of the tax. Such imbalance, per the majority below equals clear proof of "discrimination" under the Supremacy Clause;

> "It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G.R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G.R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G.R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G.R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G.R. Tax and gets no return of the overplus of approximately 50 percent." (App. 13)

But, as the dissent indicates, such a holding overrules the long line of cases represented by *Dravo, King & Boozer.* (and others cited below).

> "The reasoning of the majority *sub silentio* overrules this and other authority. In each of the above cases, the tax would apply equally to those doing work for the state government. Applying the reasoning of the majority, there is discrimination against the federal government because the otherwise legitimately-collected tax (general state revenue) reduces the state's net cost, thereby allowing it to spend less than the federal government. Thus, under the guise of

> discrimination against the federal government, ANY STATE TAX could be traced backwards to defeat its own existence." (Emphasis supplied) (App. 28-29)

In each of the following intergovernmental tax cases revenues from a state tax went to the state and not the federal government thereby "discriminating" against the Government if it is proper to compare hypothetical state and federal projects and deduct the tax from the cost of the former.

James -vs-Dravo Contracting Co., 302 U.S. 134, 82 L. Ed. 155, 58 S. Ct. 208 (1937)

> 2% gross tax on contractors—including those working for federal government.

Alabama -vs- King & Boozer, 314 U.S. 1, 86 L. Ed 3, 62 S. Ct. 43 (1941)

> 2% sales tax on contractor with a cost-plus contract for federal government.

Silas Mason Co. -vs- Tax Comm. of Washington, 302 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937)

> 2% tax on gross income of contractors building Grand Coulee Dam for Government.

United States -vs- Boyd, 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. (2d) 713 (1964)

> State use tax on property owned by the federal government but used by independent contractors in their performance of federal contracts.

United States -vs- County of Fresno, ____U.S.____, 50 L.Ed. (2d) 683, 97 S. Ct.____(1977)

> Property tax on housing owned by Federal Government and used by forest service employees.

United States -vs- Detroit, 355 U.S. 466, 2 L. Ed. (2d) 424, 78 S. Ct. 474 (1957)

> State tax on U.S. property leased to private party.

Phillips Chemical did not require any such test for Supremacy Clause discrimination such as the lower court majority made. Nor does the lower majority cite any case that does. *Phillips Chemical* simply requires that the tax treat those who deal with the Federal Government at least as well as it treats those who deal with the State.

> "Accordingly, it does not seem too much to require that the State treat THOSE WHO DEAL WITH THE (federal) GOVERNMENT AS WELL AS IT TREATS THOSE WITH WHOM IT DEALS ITSELF." (Emphasis supplied) 4 L. Ed. (2d) 391

Conclusion on Lower Majority's Misapplication of the *Phillips Chemical* Rule

The lower majority misconstrued the *Phillips Chemical* rule thereby creating havoc among the states as to the true test for Supremacy Clause "discrimination". The Supreme Court should note probable jurisdiction.

b) *The Lower Court Erroneously Refused For Any Purpose to Review the Tax Classification Under Equal Protection Standards.* [*Questions 3, 4, 5*]

The decision in *Phillips Chemical* clarified for the states what was meant by Supremacy Clause "discrimination" in inter-sovereign taxation cases. Prior to *Phillips*, the line of cases represented by *James -vs- Dravo* had approved a state tax on contractors and suppliers of the Federal Government which was not direct, not substantial and was "non-discriminatory". Until the *Phillips* decision there was some confusion in the states as to what "discrimination" meant since in tax parlance "discrimination" is a portion of the legal subject

matter denominated "classification and discrimination" (71 Am. Jur. (2d) 491, Sec. 170 et seq., "State and Local Taxation") and is gauged as to constitutionality under long-established Equal Protection rules.

> *Allied Stores of Ohio -vs- Bowers*, 358 U.S. 522, 3 L. Ed. (2d) 480, 79 S. Ct. 437 (1959)
>
> *Brown Forman Co. -vs- Kentucky*, 217 U.S. 563, 54 L.Ed. 883, 30 S. Ct. 578 (1910)

Under such Equal Protection rules, the legislatures are given great discretion in tax classification which will be upheld if there is any "conceivable basis" supporting it.

> *Madden -vs- Kentucky*, 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1939)

Prior to *Phillips Chemical* there may have been some temptation for the states in the inter-sovereign tax field to test for "discrimination" (as required by *James -vs- Dravo*) under Equal Protection, 14th Amendment rules only, as required in any tax case, but ignore supremacy connotations or at least gauge Supremacy issues by Equal Protection rules. This is what the Texas School District sought to do in the *Phillips Chemical Co.* case. There a tax was imposed on lessees of Federal property but not on lessees of State owned property. The school district sought to justify the difference under Equal Protection rules:

> "The imposition of a heavier tax burden on lessees of federal property than is imposed on lessees of other exempt (state) public property must be justified by significant differences between the two classes. The School District addresses this problem, essentially as one of

equal protection and argues that we must uphold the classification, though apparently discriminatory 'if any state of facts reasonably can be conceived that would sustain it.'"(parenthetical insert supplied) (citing *Allied Stores*)

361 U.S. 383

The Supreme Court rejected the School District's argument. It reaffirmed the vitality of the *Allied Stores* rules pertinent to Equal Protection issues but also laid down Supremacy Rules as to "discrimination" which require that a State treat those who deal with the Federal Government as well as it treats those who deal with itself.

Since the decision in *Phillips Chemical* but prior to the lower majority decision here, the rule in inter-sovereign tax cases seemed clear enough: A tax must pass two separate "discrimination" tests. As with any tax the classification between those who actually pay the tax and those who are excluded must be non-discriminatory under equal protection standards. And where a tax also has some inter-sovereign overtones, the tax must also be non-discriminatory in that it treats those taxpayers who deal with the Federal Government as well as it treats those who deal with the State.

The Supreme Court of Montana in *Kiewit* #1 recognized the necessity of the two tests and the differing rules as to each:

> "Appellant's principal argument is that a tax which is placed solely on public contractors is *discriminatory*. It maintains the only difference between public contractors and private contractors is the status of the party for whom the contractor is working. Such a difference, in

> appellant's view is not sufficient to justify the imposition of the tax." (emphasis supplied)
>
> "Our question now is—is it reasonable to make a classification for tax purposes for contractors doing public work and not for contractors doing private work?"

Then, after discussing long standing, *equal protection* rules—e.g., *Brown-Forman Co. -vs- Kentucky*, 217 U.S. 563, the Court concluded:

> "We believe that a distinction between public and private contractors is not arbitrary or capricious and following the reasoning of the United States Supreme Court—the state of Montana has power to make such a distinction and the statute in question is not unconstitutional."
>
> (App. 119)

Then, the Montana Court went on further and noted:

> "The second half of the *discrimination* question raised by appellant is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United States and other public bodies as well as it treats private nongovernmental parties. Appellant contends granting a preferred tax status to a substantial number of tax-payers, contractors performing work for private owners, and failing to grant a comparable status to construction contractors of the United States, constitutes unconstitutional discrimination against the United States and those with whom it deals.

"In response to this argument, respondent Board contends, basically, that since the state of Montana is treated in tax matters with public contractors the same as the federal government is treated, there is no discrimination. (citing *Phillips Chemical*)

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"Here, we do not believe that the state of Montana has discriminated against the federal government. The federal government is being treated in the same manner as the state of Montana treats itself and its subdivisions or municipalities. The only discrimination the federal government can claim is that private contractors are not paying the same tax as public contractors. However, according to case law, all the United States Supreme Court has required is that the state does not give itself special treatment over that received by the federal government. The Act involved here treats the federal government in the same manner as it treats those who deal with any part of the state government. The second half of the discrimination question is denied." (App. 120, 121)

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The lower court majority has now greatly confused the law and applicable rules in this area of great state concern by holding that a Supremacy test must be made not only of the relationship created by the taxing act between the two sovereigns but also that a Supremacy test (rather than an Equal Protection test) is also made of the actual classification for tax purposes between those taxed and those exempt.

> "We conclude and declare that the imposition of the G.R. Tax upon (public) Contractors discriminates against the Government in favor of private contractors, all in violation of the Supremacy Clause." (parenthetical insert added) (App.17)

Since the time of the *Phillips Chemical* decision the states have recognized that the Supremacy Clause has required that states must treat those who deal with the Federal Government as well as they treat those who deal with the state, but they didn't believe that the tax classification itself between those private citizens who had to pay the tax and those private citizens who didn't have to pay it was to be also gauged or judged by Supremacy standards. Such classification only had to pass Equal Protection muster.

Of course there was not and cannot be any direct tax on the United States; but taxes can have economic impact on non-taxpayers—particularly in sales taxes and cost-plus construction contracts. (*Alabama -vs- King & Boozer*, 314 *U.S.* 1) Under the lower court holding, a state tax which passes the proper *Phillips Chemical* Supremacy Clause test in that it equally treats the taxpayers who deal with the Federal and State Governments, respectively, and which has also classified the true taxpayers properly under Equal Protection rules, becomes unconstitutional under the Supremacy Clause if economic impact of the tax falls on the United States (*and also* on the State in question) but not on some class of private citizens who are not taxed.

The lower court interpretes the holding of *Phillips Chemical* as negating any role of Equal Protection guidelines for determining the constitutionality of classification between citizen taxpayers and citizen

non-taxpayers. The Supremacy Clause would take the place of the Equal Protection Clause and play the total and dual role of not only insuring that the State treated those who deal with it no better than those who deal with the Government but also to determine the validity of the tax classification of private citizens between those taxed and non-taxed. Thus, in addition to holding the Act unconstitutional under the Supremacy Clause as favoring the State of Montana over the Government, the lower court majority again applied the Supremacy rule and held the Act unconstitutional as favoring a class of private citizens who weren't taxed over a class of private citizens who were taxed and did so without gauging the constitutionality of the tax classification under Equal Protection standards.

> "In view of our holding that the Act violates the Supremacy Clause, we find it *unnecessary* to pass upon the Equal Protection Clause issues or upon the questions of collateral estoppel arising as to them.
>
> However, nothing in the issues raised presented, nor did the contractor Kiewit have standing to raise on behalf of the Government in *Kiewit*, the Government's current issue of the discriminatory effect upon it as an owner-building by the imposition of the G.R. Tax upon its contractors in violation of the Supremacy Clause. (citation)
>
> We conclude and declare that the imposition of the G.R. Tax upon Contractors discriminates against the Government in favor of private contractors, all in violation *of the Supremacy Clause.*" (emphasis supplied) (App. 15)

Such reasoning tests classification for tax purposes by Supremacy standards. *No State tax* could withstand such a test because in every tax there is one class who is taxed and another which is exempt. These classes of taxpayers are composed of citizens, not sovereigns, and the classification must stand up under constitutional standards formulated under the Equal Protection Clause. But if a sovereign Government is equated via the economic impact route to the position of a taxpaying citizen and the classification between those taxed and those not taxed is then gauged by Supremacy rules, *the tax will inevitably fall* even though there is a valid classification between the taxpayers under Equal Protection standards *and also* the State is found to be treating the Government as well as itself in compliance with the *Phillips Chemical* Supremacy test!

The lower court cites *United States -vs- County of Fresno*, 50 L. Ed. (2d) 683 (1977) as authority for the foregoing use of the Supremacy Clause to measure tax classification. But *Fresno* upheld a tax on private citizens' (U.S. Forest Service employees) occupation of government-owned residences. The Supreme Court found no Supremacy Clause discrimination because the tax was not only laid on federal employees occupying government residence but also on others *similarly situated:*

> "The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally *on the other similarly situated constituents of the State.*" (emphasis supplied)
>
> 50 L. Ed (2d) 692

The phrase "similarly situated" is a taxation phrase of art connoting classification for tax purposes under Equal Protection standards. The determination of the classification question of who are "similarly situated" and who are not is itself an Equal Protection function.

> *Walters -vs- St. Louis*, 347 U.S. 231, 98 L. Ed. 660, 74 S. Ct. 505 (1953)
> *Oliver Iron Mining Co. -vs- Lord*, 262 U.S. 172, 67 L. Ed. 929, 43 S. Ct. 526 (1923)

Here the tax was uniform on all taxpayers similarly situated—i.e., contractors having construction contracts for *any* public entity be it state, county, municipality, school district, Federal Government or its various subdivisions etc. If the classification was proper under Equal Protection standards as found by the Montana Supreme Court and the dissenting lower court judge here, then the rule of *Fresno* was satisfied and the economic impact of the tax on the United States fell equally on the "other similarly situated constituents of the state"—i.e., all owners of public property under construction.

Judge Kilkenny's dissent clearly recognized the error of the majority:

> "For equal protection purposes, there is a very liberal standard of review and cases will be upheld if there is any conceivable basis which will support the classification (citing *Allied Stores, Brown-Forman*). Essentially the same test is applied in cases related to intergovernmental tax immunity under the Supremacy Clause. Chief Justice Warren in the *Phillips* case, however,

> indicated that the equal protection cases are not controlling, and that the (federal) government's interest must be weighed in the balance to ascertain whether the state treats similarly-situated constituents in a similar fashion. 361 U.S. at 385. As noted above, this condition is satisfied here in that all contractors are subject to the same exact tax. In short, I think that the federal government has failed in its burden of showing the classification improper. In view of the standard of review, I would uphold the classification." (App. 33)

Conclusion on Court's Use of Supremacy Clause to Determine Classification Questions

The impact on the States of the erroneous ruling of the majority parallels its misapplication of the *Phillips* rule. Thus, *any state tax* which has economic impact on the Government because it is laid on certain citizens who contract with it or supply materials to it but is not on another class of citizens who have been classed as lying without the tax class becomes unconstitutional under the Supremacy Clause even though a valid classification exists for tax purposes under Equal Protection standards and even though the tax falls alike on those who deal with the Federal and State Governments. The Supreme Court should note probable jurisdiction to receive briefs and argument on such a far-reaching rule!

c) *Substantial Questions were Raised Under England -vs- Louisiana Medical Examiners,*

374 U.S. 411 and The Doctrine of Collateral Estoppel. [*Questions 6, 7*] l.

Why was the Government permitted to return to the Federal Court and relitigate the same constitutional challenges which it had processed through the Montana courts to the steps of the U.S. Supreme Court? The dissent below (App. 25) points out that the majority opinion doesn't specify the "issues it feels weren't decided in the State Court and why". Clearly the Government voluntarily by stipulation, submitted its federal claims for decision in the state courts. It didn't reserve anything for decision in the federal court. It controlled the state court litigation. (See conceded elements of control App. 86, Agreed Fact 12) Since there is an *England* rule which would prevent this great expense of time, trouble and uncertainty in directly-duplicated litigation, why wasn't it applicable here? This is a substantial question.

England -vs- Louisiana Medical Examiners, 375 U.S. 411, 11 L.Ed. (2d) 440, 84 S. Ct. 461 (1964)

Finally, why did not the doctrine of collateral estoppel bar the Federal Government's relitigating in the Federal Court the same basic challenges of Supremacy Clause discrimination and Equal Protection discrimination which the state court received and rejected?

Southern Pacific Railroad -vs- United States, 161 U.S. 1, 48, 18 S. Ct. 18, 42 L. Ed. 355 (1897)
Garander -vs- Public Bank, 417 F. (2d) 75, 82 (1969)

CONCLUSION

The lower court majority fundamentally erred in areas of tax law involving inter-sovereign relationships where the rules must be unambiguously set out for the several states. Prior to the lower court's decision, the rules of the *Dravo* line plus *Phillips Chemical* were clear. The subsequent *Fresno* case was also wholly consistent with such rules. Simply stated these rules required: that any state tax on private citizens must meet 14th Amendment Equal Protection classifications standards; and when the tax has overtones as to the Federal Government, the tax must not favor those who deal with the state over those who deal with the Government (*Phillips Chemical*); and finally, the tax on those who deal with the Federal Government must be the same as on others similarly situated. (*Fresno County* case) The lower court rejects these rules. It measures for equality of tax treatment at the level of the sovereigns where the economic impact is only indirect and incidental rather than at the level of the tax payers who deal with the sovereigns, and it then deducts the tax itself from the economic impact on the state to create an alleged imbalance between sovereigns in violation of the Supremacy rule. Furthermore in this inter-sovereign field it refuses to recognize the applicability of Equal Protection rules for determining valid tax classification even though the tax is on private individuals and, as with any tax, there are some private individuals included and some excluded. By identifying the Government with the included taxpayers and comparing it under Supremacy rules with the excluded taxpayers, the lower court invariably finds "discrimination". Such alleged discrimination would not exist if the Court would recognize (or test for)

valid classification under Equal Protection rules; for the tax-payers who deal with the Federal Government would then be compared to similarly situated *taxpayers* and no inequality would be noted.

Such combined uses of the Supremacy doctrine substantially exclude the several states from taxing private individuals doing business with the Government. This will severely limit the abilities of states to perform their varied functions.

It is of the greatest importance to Montana and to the several states that this Supreme Court note probable jurisdiction and pass upon the foregoing substantial issues.

Respectfully submitted,

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